ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	MDL Docket No. 1446
This Document Relates To: MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, vs. ENRON CORP., et al., Defendants.	Civil Action No. H-01-3624 (Consolidated)
HUDSON SOFT CO., LTD., On behalf of itself and all others similarly situated, Plaintiff, v. CREDIT SUISSE FIRST BOSTON CORPORATION, CITIGROUP, INC.,et. al., Defendants.	H-03-CV-0860
CONSECO ANNUITY ASSURANCE COMPANY, Individually and on Behalf of All Others Similarly Situated, Plaintiff, v. CITIGROUP, INC., CITIBANK, N.A., CITICORP, SALOMON SMITH BARNEY, SALOMON BROTHERS INTERNATIONAL LIMITED, et. als., Defendants.	H-03-CV-2240

CONSECO ANNUITY ASSURANCE COMPANY'S SUBMISSION REGARDING THE MOTION OF DEFENDANTS CITIGROUP INC., CITIBANK, N.A. SALOMON SMITH BARNEY, INC. AND SALOMON BROTHERS INTERNATIONAL LIMITED (COLLECTIVELY, "CITIGROUP") TO DISMISS CERTAIN CLAIMS ASSERTED IN PLAINTIFFS' FIRST AMENDED CONSOLIDATED COMPLAINT

PRELIMINARY STATEMENT

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Now comes the plaintiff Conseco Annuity Assurance Company ("Conseco") in the actions *Hudson Soft Co. Ltd v. Credit Suisse First Boston Corp., et. al.*, No. 01-CV-5768 (S.D.N.Y.), consolidated as H-03-0860 (the "*Hudson Soft* Action") and *Conseco Annuity Assurance Company v. Citigroup, Inc., et. al.*, No. 03-CV-1559 (S.D.N.Y.), consolidated as H-03-2240 (the "*Conseco* Action")[1] and it respectfully submits this memorandum regarding the Motion of Defendants Citigroup Inc., Citibank, N.A., Salomon Smith Barney, Inc. and Salomon Brothers International Limited (collectively, "Citigroup") to Dismiss Certain Claims Asserted in [the *Newby*] Plaintiffs' First Amended Consolidated Complaint (the "Citigroup Motion").

In the Citigroup Motion, Citigroup seeks dismissal of the newly asserted claims against it by the *Newby* Plaintiffs in their First Amended Consolidated Complaint (the "First Amended *Newby* Complaint") arising out of Citigroup's issuance and sale of the Credit Linked Notes.[2] Citigroup argues, among other things, that the *Newby* Plaintiffs lack standing to assert those claims. Conseco agrees that the *Newby* Plaintiffs lack standing and submits this Memorandum solely for the purposes of addressing the standing issues.

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[1] In both the *Hudson Soft* Action and the *Conseco* Action, Conseco raises individual and class claims against Citigroup and certain of its affiliates and employees in connection with the issuance and sale of the Credit Linked Notes as defined in n. 2 below. Plaintiff Hudson Soft, Inc. ("Hudson Soft") raises claims against Credit Suisse First Boston and certain of its affiliates ("CSFB"), as well as certain of its employees. Both actions have been consolidated into the *Newby* Action.

[2] The Credit Linked Notes were not issued by Enron. Rather, they were issued by trusts created by Citigroup. They included the following securities: (a) Yosemite Securities Trust I 8.25% Series 1999-A Linked Enron Obligations maturing November 15, 2004, issued in the aggregate amount of $750,000,000 on or about November 4, 1999 ("Yosemite I Notes"); (b) Yosemite Securities Trust II 8.75% Series 2000 Linked Enron Obligations maturing February 2007, issued in the aggregate amount of £200,000,000 on or about February 23, 2000 ("Yosemite II Notes"); (c) Credit Linked Notes Trust 8% Notes maturing August 15, 2005, issued in the aggregate amount of $500,000,000 on or about August 25, 2000 ("ECLN Notes"); (d) Credit Linked Notes Trust II 7 3/8 % Notes maturing May 15, 2006, issued in the aggregate amount of $500,000,000 on or about May 24, 2001 ("ECLN II Notes"); (e) Enron Sterling Credit Linked Notes Trust 7 1/4% Notes maturing May 24, 2006, issued in the aggregate amount of £125,000,000 on or about May 24, 2001 ("Sterling CLN Notes"); and (f) Enron Euro Credit Linked Notes Trust 6 1/2% Notes maturing May 24, 2006, issued in the aggregate amount of 200,000,000 Euro on or about May 24, 2001 ("Euro CLN Notes").

Together the Yosemite I Notes, the Yosemite II Notes, the Yosemite III Notes, the ECLN Notes, the ECLN II Notes, Sterling CLN Notes and the Euro CLN may be collectively referred to herein as "Citigroup CLNs."

Standing is a core component of the case and controversy requirement of the United States Constitution and is a threshold issue in every federal case. In order to have standing, a plaintiff must establish that he has a personal stake in the alleged dispute and that he is the proper party to bring a particular matter to the court for adjudication. A plaintiff can only assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties. That a suit is brought as a class action does not change the standing inquiry. A plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been plaintiffs. Simply put, standing cannot be acquired through the back door of a class action.

Unlike Conseco, none of the *Newby* Plaintiffs purchased any of the Citigroup CLNs. Thus, Conseco is the only plaintiff that has standing to assert claims under the federal securities laws arising out of the issuance and sale of the Citigroup CLNs. The *Newby* Plaintiffs do not. Indeed, in all of the notices published by the *Newby* Plaintiffs and in all of their earlier complaints, the *Newby* Plaintiffs only purported to represent the "publicly traded debt and equity holders of Enron Corporation ("Enron"). Although the Citigroup CLNs were not "publicly traded equity or debt securities of Enron" and none of the *Newby* Plaintiffs are alleged to have purchased any of the Citigroup CLNs, the *Newby* Plaintiffs have nevertheless recently attempted to vastly expand the scope of their prior complaints in furtherance of their improper attempt to seek relief on behalf of the purchasers of the Citigroup CLNs. They lack standing to do so.

Although Conseco is aware that this Court has previously stated that it would defer ruling on the same standing issues until it decides the motion for class certification, Conseco respectfully submits that it would be inappropriate for this Court to postpone a decision on standing, which directly implicates this Court's jurisdiction over the claims at issue. The question of standing is totally separate and distinct from the question of a plaintiff's right to represent a class under Fed. R.

Civ. P. 23. Where as here, none of the *Newby* plaintiffs are alleged to have purchased the Citigroup CLNs, they do not have standing to assert any claims arising out of those purchases. Because standing goes to the fundamental question of the jurisdiction of this court, the proper procedure is to dismiss those claims rather than defer consideration of the *Newby* plaintiff's standing until class certification.

SUMMARY OF PROCEDURAL BACKGROUND

By Memorandum and Order, dated February 15, 2002, this Court appointed the Regents of the University of California, as Lead Plaintiff, on behalf of the purchasers of publicly traded debt and equity securities of Enron Corporation ("Enron") during a proposed Class Period from October 19, 1998 through November 27, 2001 (the "Class Period"). *See In re Enron Corp. Securities Litigation,* 206 F.R.D. 427, 458 (S.D.Tex. 2002). Neither that Order, nor the requisite notices published pursuant to pursuant to Section 21D of the Private Securities Litigation Reform Act ("PSLRA"), 15 U.S.C. §78u-4(a)(3)(A)(i) (all of which referred to "Enron stock" or "Enron securities"), contemplated that the *Newby* Plaintiffs would be prosecuting claims on behalf of purchasers of securities that had not been issued by Enron.

Following the appointment of the Lead Plaintiff in the *Newby* Action, on April 8, 2002, the *Newby* Plaintiffs filed a Consolidated Complaint for Violations of the Securities Laws (the "*Newby* Consolidated Complaint"), with respect to Enron's "publicly traded equity and debt securities between 10/1/98 and 11/27/01." *Newby* Consolidated Complaint, ¶¶1, 79-81. The *Newby* Consolided Complaint defined the Enron's publicly traded equity and debt securities as follows:

> Enron's publicly traded debt securities and equity securities as well as preferred securities issued by Enron, Enron Capital LLC 8% Cumulative Guaranteed Monthly Income Preferred Shares, Enron Capital Trust I Originated Preferred Securities, Enron Capital Trust II Trust Originated Securities and Enron Capital Resources, L.P. 9% Cumulative Preferred Securities (collectively, the "Preferred Securities").

Id., ¶986, n. 15.

On September 29, 2002 Hudson Soft filed the First Amended Class Action Complaint in the *Hudson Soft* Action, alleging class claims arising under the federal securities laws. At the time it filed that complaint, Hudson Soft also caused a notice entitled "Class Action Lawsuit Amended on September 29, 2002 on Behalf of Purchasers Of Credit Linked Notes Issued By Credit Suisse First Boston and Citigroup, Inc. by Abbey Gardy, LLP" to be published on PR Newswire in order to satisfy the requirements of the PSLRA, 15 U.S.C. §§ 78u-4(a)(3)(A)(i).

On October 30, 2002, Hudson Soft filed a motion seeking appointment as Lead Plaintiff in the *Hudson Soft* Action. On November 27, 2002, within the time period prescribed by the PSLRA, Hudson Soft and Conseco filed a Notice of Motion Of Hudson Soft Co., Ltd. And Conseco Annuity Assurance Company To Be Appointed As Lead Plaintiffs And For The Approval Of Their Selection Of Co-Lead Counsel on November 27, 2002 (the "*Conseco* Lead Plaintiff Motion"), which motion, inter alia, sought appointment of Conseco as the Lead Plaintiff on behalf of all purchasers of the Citigroup CLNs. On December 13, 2002, numerous corporate defendants filed an Opposition to the *Conseco* Lead Plaintiff Motion. Conseco and Hudson Soft served their reply on March 7, 2003.

Throughout this entire process, Hudson Soft and Conseco were the only entities that filed a complaint against Citigroup on behalf of the purchases of the Citigroup CLNs and were the only entities that made a motion to be appointed lead plaintiff within the period prescribed under the PSLRA. Notably absent from this entire process were the *Newby* Plaintiffs. The *Newby* Plaintiffs did not file a motion to be appointed lead plaintiff on behalf of the purchasers of the Citigroup CLNs. Only after the *Hudson Soft* and *Conseco* Actions were transferred to the Southern District of Texas, and after the *Newby* Plaintiffs realized the strength of the action against Citigroup on behalf of the Citigroup CLN Class did the *Newby* Plaintiffs decide to add claims against Citigroup on behalf of the purchasers of the Citigroup CLNs.

The *Newby* Plaintiffs sought to add these claims against Citigroup in a footnote in the First Amended *Newby* Complaint even though none of the *Newby* Plaintiffs purchased the Citigroup CLNs and none of the *Newby* Plaintiffs complied with the notice requirements of the PSLRA. In footnote 20, on page 625, the *Newby* Plaintiffs attempt to vastly expand the scope of the claims asserted by re-defining Enron's publicly traded equity and debt securities to include the Citigroup CLNs. *See* First Amended *Newby* Complaint, ¶968, n. 20.

Only Conseco purchased the Citigroup CLNs and complied with the PSLRA in seeking to be appointed Lead Plaintiff to pursue claims arising out of those purchases. None of the *Newby* Plaintiffs purchased the Citigroup CLNs and none complied with the PSLRA. Accordingly, Conseco is the only entity with standing to represent the purchasers of the Citigroup CLNs in an action against Citigroup. Because the *Newby* Plaintiffs lack standing to assert any claims in connection with the issuance and sale of the CLN Notes, Conseco respectfully requests that this Court grant Citigroup's motion to dismiss those claims.

ARGUMENT

I. The Constitutional and Prudential Limitations to the *Newby* Plaintiffs' Standing.

Under Article III of the United States Constitution, federal courts have jurisdiction over a dispute only if it is a "case" or "controversy." As the Supreme Court said in *Simon v. Eastern Ky. Welfare Rights Organization*: "No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." 426 U.S. 26, 37, 96 S.Ct. 1917, 1924 (1976).

"As an incident ... of this bedrock requirement, th[e Supreme] Court has always required that a litigant have 'standing' to challenge the action sought to be adjudicated in the lawsuit." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471, 102 S.Ct. 752 (1982); *Raines v. Byrd*, 521 U.S. 811, 818, 117 S.Ct. 2312 (1997) ("One

element of the case-or-controversy requirement is that [plaintiffs], based on their complaint, must establish that they have standing to sue."); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 2136-37 (1992) ("the core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III"). Standing, therefore, is "the threshold question in every federal case." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 2205 (1975).

Because "the exercise of judicial power ... can so profoundly affect the lives, liberty, and property of those to whom it extends ... the decision to seek review must be placed in the hands of those who have a direct stake in the outcome." *Diamond v. Charles*, 476 U.S. 54, 62, 106 S.Ct. 1697 (1986). Thus, in order "to meet the standing requirements of Article III, a plaintiff must allege personal injury fairly traceable to the defendant's alleged unlawful conduct and likely to be redressed by the relief requested." *Raines*, 521 U.S. at 818; *Lujan*, 504 U.S. at 560-61; *Valley Forge Christian College*, 454 U.S. at 471.

"Beyond the constitutional requirements, the federal judiciary has also adhered to a set of prudential principles that bear on the question of standing." *Valley Forge Christian College*, 454 U.S. at 471; *Warth*, 422 U.S. at 498. To satisfy these standing requirements the plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Valley Forge Christian College*, 454 U.S. at 471, 102 S.Ct. at 758. In addition, "the plaintiff's complaint fall within 'the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.'" *Id.*; *McCormack v. National Collegiate Athletic Association*, 845 F.2d 1338, 1340-41 (5th Cir. 1988).

The Supreme Court has always insisted on strict compliance with its standing requirements and has held that "[a] federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155, 110 S.Ct. 1717 (1990). As the Supreme Court stated in *Raines*:

> We must put aside the natural urge to proceed directly to the merits ... and to settle it for the sake of convenience and efficiency. Instead, we must carefully inquire as to whether [plaintiffs] have met their burden of establishing that their claimed injury is personal, particularized, concrete, and otherwise judicially cognizable.

521 U.S. at 820.

The *Newby* Plaintiffs argue that "the better course is to defer ruling on issues of standing ... so as no to splinter this already complex action." This Court must resist that urge "for the sake of convenience and efficiency" and carefully examine whether the *Newby* Plaintiffs meet the jurisdictional standing requirements. When those requirements are carefully examined, the only conclusion that this Court can reach is that Conseco is the only plaintiff which has suffered a "personal, particularized, concrete, and otherwise judicially cognizable" injury as a result of its purchases of the Citigroup CLNs.

By contrast, the *Newby* Plaintiffs, who did not purchase any of the Citigroup CLNs, cannot establish that they suffered a "personal, particularized, concrete, and otherwise judicially cognizable" injury in connection with the issuance and sale of the Citigroup CLNs. Instead of asserting their own legal rights and interests, the *Newby* plaintiffs' claims for relief rest of the legal rights and interests of third parties, such as Conseco. The *Newby* Plaintiffs have not met the bedrock requirement of establishing their standing and therefore no case or controversy arises.

II. Standing Must Be Established Before A Court Will Look To Fed.R.Civ.P. 23 To Evaluate The Ability of Named Plaintiffs to Represent A Proposed Class.

The *Newby* Plaintiffs do not argue that they have standing, as required by the Supreme Court authority discussed above. Instead, they urge this Court to defer its inquiry into their standing until it addresses their motion for class certification. However,

> the question of standing is totally separate and distinct from the question of plaintiff's right to represent a purported class under Rule 23. While standing to sue is an essential prerequisite to maintaining an action, whether in one's own right or as a representative of a class, the issues are not convertible. Standing to sue is an essential

> threshold which must be crossed before any determination as to class representation under Rule 23 can be made.

Angel Music, Inc. v. ABC Sports, Inc., 112 F.R.D. 70, 74 (S.D.N.Y.1986).

"Only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a), to assert the rights of others." *Wooden v. Board of Regents of University System of Georgia*, 247 F.3d 1262, 1288 (11th Cir. 2001); *Prado-Steiman ex rel. Prado v. Bush*, 221 F.3d 1266, 1280 (11th Cir. 2000) ("Thus, it is well-settled that prior to the certification of a class, and technically speaking before undertaking any formal typicality or commonality review, the district court must determine that at least one named class representative has Article III standing to raise each class subclaim."); *Griffin v. Dugger*, 823 F.2d 1476, 1482, 1483 (11th Cir.1987) ("only after the court determines the issues for which the named plaintiffs have standing should it address the question whether the named plaintiffs have representative capacity, as defined by Rule 23(a)"); *Beal v. Midlothian Independent School District of Ellis County, Texas*, 2002 WL 1033085 (N.D.Tex. May 21, 2002) ("the issue of standing present a threshold matter the court must address before determined the propriety of class certification"); *Association for Disable Americans, Inc. v. 7-Eleven, Inc.*, 2002 WL 546478, *1 (N.D. Tex. April 10, 2002) ("The plaintiffs' standing presents a threshold challenge which the Court must address before determining the propriety of class certification."); *Roe v. City of New Orleans, Louisiana*, 766 F.Supp. 1443, 1449 (E.D. La. 1991) ("constitutional [standing] threshold must be met before any consideration of the typicality of claims or commonality of issues required for procedural reasons by Fed.R.Civ.P. 23.").

As the Court held in *Daley's Dump Truck Service, Inc. v. Kiewit Pacific Co.*:

> Standing must be established before a court will look to Fed.R.Civ.P. 23 to evaluate the ability of named plaintiffs to represent the proposed class. Rule 23 cannot alter or abridge the limitations on cases, controversies, or statutory claims, that are mandated by the Constitution or by Congress.

> As a procedural rule, Rule 23 cannot be construed to extend or limit the jurisdiction and venue of federal courts or to abridge, modify or enlarge any substantive right. Thus, for example, a class action cannot confer standing to sue on a named plaintiff who seeks to represent a class ... [A] class representative must have individual standing to raise the claims in controversy, and then that plaintiff can represent a class under procedural Rule 23.

759 F.Supp. 1498, 1502 (W.D. Wash. 1991) (emphasis added). [3]

Likewise, as the Court held in *Gabrielsen v. BancTexas Group, Inc.*:

> If the Court concludes that the proposed class representatives lack individual standing, the proper procedure is to dismiss the complaint, rather than to deny the class for inadequate representation or to allow other class representation to step forward. Dismissal on standing grounds is to take place before class certification issues are even reached.

675 F.Supp. 367, 371 n.3 (N.D.Tex.1987) (emphasis added); *In re Delmarva Securities Litigation*, 794 F.Supp. 1293, 1309 (D. D. Del. 1992) ("The proper procedure when the class representative lacks individual standing is to dismiss the complaint."); *Haft v. Eastland Financial Corp.*, 772 F.Supp. 1315,1316 (D.R.I. 1991) ("standing is a preliminary matter to be evaluated upon the allegations of the complaint").[4]

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[3] *See also Vulcan Society of Westchester County, Inc. v. Fire Dept.*, 82 F.R.D. 379, 399 (S.D.N.Y. 1979); *Weiner v. Bank of King of Prussia*, 358 F.Supp. 684, 694 (E.D.Pa.1973).

[4] Relying on *Brown v. Sibley*, 650 F.2d at 771, the *Newby* Plaintiffs argue that dismissal for lack of standing is not required at this time and that the better course would be to "entertain an amended complaint setting up separate subsets of the proposed class." In fact, the Court in *Brown* declined to decide the question as to whether it is appropriate to defer dismissal on that basis. The Court held:

> In a single-claim action, because individual standing requirements constitute a threshold inquiry, the proper procedure when the class plaintiff lacks individual standing is to dismiss the complaint, not to deny the class for inadequate representation or to allow other class representatives to step forward. This dismissal should take place before class certification issues are ever reached.... Here, however, where three distinct claims were asserted in the same cause of action, whether the district court should have dismissed any claims that named plaintiffs had no standing to bring or for which there existed no private cause of action, or whether instead the court should have entertained an amended complaint setting up separate subsets of the proposed class, is a closer question and one we need not decide here.

Id. Here, there is no reason to defer dismissal because the rights and interests of the purchasers of the Citigroup CLNsare being pursued by a plaintiff – Conseco – which purchased the Citigroup CLNs and unquestionably has standing to bring those claims.

In its August 7, 2002 Order, this Court recognized that "it is evident that some groups of Plaintiffs do not fit into the class definition of the Consolidated Complaint and that [the *Newby*] Lead Plaintiff may not have standing to be a class representative..." and stated that the Court would deal with issues of standing "around the time of class certification." With all due respect, Conseco submits that it would be inappropriate for this Court to defer a decision on the *Newby* Plaintiffs' standing, which goes to the heart of this Court's jurisdiction. Moreover, because none of the *Newby* Plaintiffs has standing to sue in connection with the purchase and sale of the Citigroup CLNs, this Court cannot cure this standing defect through the creation of a headless class or subclass.

III. This Court May Not Permit the *Newby* Plaintiffs to Circumvent the Standing Requirements Simply Because They Filed the Suit as a Class Action.

> That a suit may be a class action ... adds nothing to the question of standing, for even named plaintiffs who represent a class 'must allege and show that they personally have been injured, not that injury has been suffered by other, unidentified members of the class to which they belong and which they purport to represent.

Lewis v. Casey, 518 U.S. 343, 344, 116 S.Ct. 2174 (1996) (emphasis added). Thus, "if none of the named plaintiffs purporting to represent a class establishes a requisite case or controversy with the defendant, none may seek relief on behalf of herself or himself or any other member of the class." *O'Shea v. Littleton*, 414 U.S. 488, 494-95, 94 S.Ct. 669 (1974); *Simon*, 426 U.S. at 40 n.20 ("[N]amed plaintiffs who represent a class must allege and show that they personally have been injured, not that injury has been suffered by other unidentifiable members of the class to which they belong and which they purport to represent."); *Warth*, 422 U.S. at 502 (standing requirement not met by alleging "that injury has been suffered by other, unidentified members of the class to which [plaintiffs] belong and which they purport to represent"); *Harris v. McRae*, 448 U.S. 297, 320 n. 23, 100 S.Ct. 2671 (1980) (named plaintiffs who have not established their own standing to sue, "cannot represent a class of whom they are not a part").

As the Court of Appeals for the Fifth Circuit held in *Brown v. Sibley*:

> Inclusion of class action allegations in a complaint does not relieve a plaintiff of himself meeting the requirements for constitutional standing, even if the persons described in the class definition would have standing themselves to sue. If the plaintiff has no standing individually, no case or controversy arises. This constitutional threshold must be met before any consideration of the typicality of claims or commonality of issues required for procedural reasons by Fed.R.Civ.P. 23.

650 F.2d 760, 771 (5th Cir. 1981).

The Fifth Circuit in *Brown* went on to cite Chief Justice Burger's concurring opinion in *Allee v. Medrano*, in which he analyzed the situation in the following terms:

> A named plaintiff cannot acquire standing to sue by bringing his action on behalf of others who suffered injury which would have afforded them standing had they been named plaintiffs; it bears repeating that a person cannot predicate standing on injury which he does not share. Standing cannot be acquired through the back door of a class action.

Brown, 650 F.2d at 771, quoting *Allee*, 416 U.S. 802, 828-29, 94 S.Ct. 2191 (Burger, C. J., concurring).[5]

Thus, "[a] court must assess standing to sue based upon the standing of the named plaintiffs and not upon the standing of unidentified class members." *In re General Motors Class E Stock Buyout Securities Litigation*, 694 F.Supp. 1119, 1126 (D. Del. 1988); *Adair v. Sorenson*, 134 F.R.D. 13, 16 (D. Mass. 1991).

Because the *Newby* Plaintiffs have not been injured by the issuance of the Citigroup CLNs, they do not have standing to assert such claims. Moreover, the law is clear that they cannot base their standing on the injuries suffered by Conseco, and the other purchasers of the Citigroup CLNs. By

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[5] *See also Matte v. Sunshine Mobile Homes, Inc.*, 2003 WL 21645339 (W.D. La. June 9, 2003) (class actions do not alter the constitutional requirement of standing); *Comfort v. Lynn School Committee*, 150 F.Supp.2d 285, 295 (D.Mass. 2001) ("The fact that the plaintiffs in this case may also seek to represent a class does not affect my standing inquiry..."); *Haft*, 772 F.Supp. at 1316 ("The fact that a case is brought as a class action does not change the calculus; named plaintiffs "cannot represent a class of whom they are not a part."); *Roe v. City of New Orleans, Louisiana*, 766 F.Supp. 1443, 1449 (E.D. La. 1991) ("Inclusion of class action allegations in a complaint does not relieve a plaintiff of himself meeting the requirements for constitutional standing, even if the persons described in the class definition would have standing themselves to sue."); *Angel*, 112 F.R.D. at 74 (plaintiff may not use the procedural device of a class action to bootstrap himself into standing he lacks under the express terms of the substantive law).

attempting to artificially broaden the definition of "Enron publicly traded equity and debt securities" in the First Amended *Newby* Complaint, the *Newby* Plaintiffs are attempting obtain standing through the "back door" of this class action. This Court should reject their attempts to do so.

IV. The *Newby* Plaintiffs Do Not Have Standing To Sue Under the Federal Securities Laws With Respect to Securities Which They Did Not Purchase.

> Although standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal, it often turns on the nature and source of the claim asserted. The actual or threatened injury required by Art[icle] III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.... Moreover, the source of the plaintiff's claim to relief assumes critical importance with respect to the prudential rules of standing that, apart from Art[icle] III's minimum requirements, serve to limit the role of the courts in resolving public disputes. Essentially, the standing question in such cases is whether the constitutional or statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.

Warth, 422 U.S. at 499-500; *Diamond*, 476 U.S. at 55.

Moreover, "standing is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6, 116 S.Ct. 2174 (1996). "Standing ... must be addressed on a claim-by-claim basis." *James v. City of Dallas, Texas*, 254 F.3d 551, 563 (5th Cir. 2001).[6]

> It is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to one of many claims he wishes to assert. Rather, each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim.

Wooden, 247 F.2d at 1288. Thus, this Court must "careful[ly] examin[e] whether the particular plaintiff is entitled to an adjudication of the particular claims asserted." *Allen v. Wright*, 468 U.S. 737, 752, 104 S.Ct. 3315 (1994).[7]

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[6] *See also Rosen v. Tennessee Commissioner of Finance and Administration*, 288 F.3d 918 (6th Cir. 2002); *Brownsburg Area Patrons Affecting Change v. Baldwin*, 943 F.Supp. 975 (S.D.Ind. 1996).

[7] *See also Association for Disable Americans, Inc. v. 7-Eleven, Inc.*, 2002 WL 546478, *2-4 (N.D. Tex. April 10, 2002) ("While the plaintiffs have standing to pursue Title III claims related to their disabilities, the Court must reject plaintiffs' claim that this limited standing confers carte blanche standing to pursue the Title III claims that

(continued...)

In this case, the *Newby* Plaintiffs attempt to assert claims against Citigroup in connection with the issuance and sale of the Citigroup CLNs under Section 12(a)(2) of the Securities Act of 1933 (the "Securities Act") and Section 10(b) of the Securities Exchange Act of the 1934 (the "Securities Exchange Act"), even though none of the Plaintiffs purchased the Citigroup CLNs either in the offerings or in the after-market. They do not have standing to assert either claim.

Section 12(a)(2) of the Securities Act, by its express terms, limits recovery to purchasers the securities at issue. 15 U.S.C. §771(a)(2). *See 7547 Corp. v. Parker & Parsley Development Partners*, 38 F.3d 211, 225 (5th Cir. 1994) ("standing to sue under the private right of action afforded by [Section 12(2) of the Securities Act] is based upon the requirement that the plaintiff be a 'purchaser' of the security at issue"). Thus, the Southern District of Texas has held that plaintiffs who did not "acquire" any of the securities offered in a public notes offering had no standing to bring Securities Act claims on behalf of a class of purchasers who did purchase securities in that offering:

> Plaintiffs therefore have failed to plead the express statutory standing requirements for an action under Section 11 and 12 of the Securities Act, and they have failed to state a cause of action upon which relief can be granted with respect to the Notes Offering.

In re Paracelsus Corp., Sec. Litigation, 6 F. Supp.2d 626, 631 (S.D. Tex. 1998).[8]

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[7](...continued)
every disabled person may have against 7-11.").

[8]*See also Smolen v. Deloitte, Haskins & Sells*, 921 F.2d 959, 965 (9th Cir. 1990) (dismissing claims under Section 12(2) of the Securities Act when plaintiffs were not purchasers or offerees in the offering at issue); *In re Azurix Corp. Securities Litigation,* 198 F.Supp.2d 862, 892 (S.D. Tex. 2002) (plaintiffs have no standing to sue under Sections 11 or 12 of the Securities Act because they did not purchase their shares of Azurix stock in the company's

(continued...)

Similarly, in *Blue Chip Stamps v. Manor Drug Stores,* the Supreme Court determined that recovery under Section 10(b) of the Securities Exchange Act is also limited to purchasers or sellers of the securities at issue. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 735 (1975). The Supreme Court reasoned that the express causes of action created by Congress in Sections 11 and 12 of the Securities Act limit recovery to "an person acquiring such security" and "to the person purchasing such security," respectively. *Id.* at 736. The boundaries of recovery expressed by Congress in those causes of action (Sections 11(a) and 12 of the Securities Act) are specifically delineated; thus, the Court should not expand the plaintiff class for a similar, but judicially implied, cause of action under Section 10(b) of the Securities Exchange Act. *Id.* Relying on *Blue Chip Stamp*, the Fifth Circuit has repeatedly dismissed Rule 10b-5 claims when the plaintiff has failed to meet the purchaser-seller requirement. *See Kaplan v. Utilicorp United, Inc.*, 9 F.3d 405, 407 (5th Cir. 1993) ("There is no nexus between the alleged actions of defendants Utilicorp, Aquila Energy, Aquila, and Green and plaintiff Heineman because Heineman purchased stock before the alleged fraud began.... Therefore, Heineman has no standing to sue Utilicorp, Aquila, Aquila Energy, or Green."); *Smith v. Ayers*, 977 F.2d 946, 949-50 (5th Cir. 1992) ("The guidepost case determining standing rules for 10b-5 actions is *Blue Chip Stamps* [which] ... adopted the venerable *Birnbaum* Rule ... in which

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[8](...continued)
initial public offering); *Danis v. USN Communications, Inc.*, 189 F.R.D. 39, 400 (N.D. Ill. 1999) (plaintiffs lacked standing to assert Section 12(a)(2) claims against each member of the underwriter defendant class because Section 12(a)(2) requires privity between a plaintiff and the seller of the securities at issue and it permits suit against the seller of a security only by "the person purchasing such security from him"); *Moskowitz v. Mitcham Industries*, 1999 WL 33606198 *2 (S.D.Tex., Sep 28, 1999) (the only plaintiffs who have standing to sue under Section 12 are those who have purchased their shares directly from a seller in the offering); *In re Delmarva Sec. Litig.*, 794 F.Supp. 1293, 1309 (D.Del.1992) (dismissing Section 12(a)(2) claim where class plaintiffs lacked individual standing to assert claims against defendants).

the Second Circuit restricted Rule 10b-5 actions to persons who are either purchasers or sellers of securities."); *Rathborne v. Rathborne,* 683 F.2d 914, 918 (5th Cir. 1982) ("In order to bring a private damage action under Rule 10b-5 a plaintiff must allege that he himself was an actual purchaser or seller of securities. Thus, even if it can be established that there has been wrongdoing "in connection with the purchase or sale of a security," a private party does not have standing to recover under Rule 10b-5 unless the plaintiff can allege and ultimately establish that he himself was a purchaser or seller.").

There can be no dispute that if the *Newby* Plaintiffs had brought an individual suit in connection with the purchase of the Citigroup CLNs, they would not have standing to sue under either section 10(b) of the Securities Exchange Act or section 12(a)(2) of the Securities on behalf of those purchasers, because none of them purchased the securities at issue.[9] As discussed above, they cannot

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[9]Thus, in *Nenni v. Dean Witter Reynolds, Inc*, the Court in dismissing a complaint, held that the plaintiff could not sue with regard to mutual funds in which he had not invested:

> It is undisputed that Nenni has acquired stock in only four of the mutual funds he names in the complaint. Nenni attempts to include in the class purchasers of all forty-one mutual funds listed. This is inappropriate. Nenni has standing to bring claims for the shares in the four mutual funds that he actually holds. That is, Nenni at most can only create a class of people who have purchased shares of same mutual funds that he actually holds.

Civil Action No. 98-12454-REK, Memorandum and Order, Slip Op. at 5 (D. Mass. Sept. 29, 1999).

Similarly, in *Ramos v. Patrician Equities Corp.*, 765 F.Supp. 1196, 1199 (S.D.N.Y.1991), the Court held, that even though one of the named plaintiffs had standing to sue a defendant accounting firm in connection with his purchase of a limited partnership interest, he did not have standing to sue that defendant in connection with the accounting firm's work for 19 other limited partnerships:

> Neither Ramos nor Rabin has standing to sue Nationwide, McGraw-Hill or Carro Spanbock. There is no allegation that these defendants prepared or contributed to any of the allegedly misleading materials used in the partnerships in which plaintiffs invested, and therefore no sufficient allegation that these defendants injured plaintiffs. Since Ramos and Rabin have no standing to sue Nationwide, McGraw-Hill and Carro Spanbock, they cannot act as class representatives in connection with claims against these three defendants.
>
> As to Hecht, Rabin has no standing to sue this defendant, because Hecht performed no work for Southroads, the one partnership in which Rabin invested. Rabin cannot act as class representative on any claims against Hecht. The other plaintiff, Ramos, invested in Woburn Mall, as to which Hecht performed the accounting. Therefore, Ramos has standing to sue Hecht in connection with this

(continued...)

use the procedural device of a class action to extend the jurisdiction of this court to those claims. Therefore, the proper and required course of action, is for this Court to dismiss those claims.

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[9](...continued)
partnership. However, Hecht is alleged in the complaint to have acted as the accountant for 19 partnerships other than Woburn Mall. Ramos has no standing to sue Hecht on these 19 partnerships. Ramos can act as class representative only for Woburn.

Id. See also In re Colonial Ltd. Partnership Litigation, 854 F.Supp. 64, 82-83 (D.Conn.1994) (where the Court held that the named plaintiff lacked standing to bring claims on behalf of purchasers of limited partnership interests in which named plaintiff had not invested); and *Spira v. Nick,* 876 F.Supp. 553, 562 (S.D.N.Y. 1995) (where the court held that plaintiff does not have standing to seek relief on behalf of the investors of the twenty-three other entities in which he does not claim an interest).

CONCLUSION

This Court should address the serious standing issues raised by Citigroup in its Motion to Dismiss at this juncture in the case. Because none of the *Newby* Plaintiffs purchased the Citigroup CLNs, they do not have standing to assert claims arising out of the issuance and sale of those securities. Accordingly, their claims should be dismissed for lack of standing.

Dated: July 31, 2003

Respectfully submitted by the Attorneys
For Conseco Annuity Assurance Company,

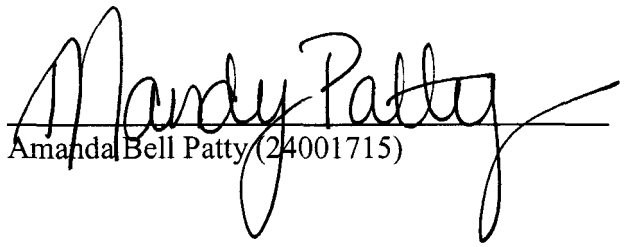
Amanda Bell Patty (24001715)
Kelly Puls
Brant Martin
Puls Taylor & Woodson
2600 Airport Freeway
Fort Worth, TX 76111
Phone: (817) 338-1717

Paul O. Paradis
Evan J. Kaufman
Michelle Z. Hall
Abbey Gardy, LLP
212 East 39th Street
New York, NY 10016
(212) 889-3700

Edward F. Haber
Michelle H. Blauner
Matthew Tuccillo
Shapiro Haber & Urmy LLP
75 State Street
Boston, MA 02109
(617) 439-3939

Certificate of Service

I hereby certify that on this 31st day of July 2003, I caused a true and correct copy of the foregoing Conseco Annuity Assurance Company's Submission Regarding The Motion of Defendants Citigroup, Inc., Citibank, N.A., Salomon Smith Barney, Inc. and Salomon Brothers International Limited To Dismiss Certain Claims Asserted In Plaintiff' First Amended Consolidated Complaint to be served electronically to counsel of record by serving it on Liason Counsel pursuant to this Court's June 6, 2002 Order, paragraphs 5 and 6.



Amanda Bell Patty (24001715)